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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

PAUL HOLMAN and LUCY RIVELLO,
 individually and on behalf of all others
 similarly situated,

Plaintiffs,

v.

APPLE, INC., AT&T MOBILITY LLC, and
 DOES 1 through 50, inclusive.

Defendants

Case No. 07-CV-05152-JW

**DEFENDANTS' MOTION TO
 ENLARGE TIME TO ANSWER OR
 OTHERWISE RESPOND TO
 PLAINTIFFS' COMPLAINT**

Date: Not Scheduled
Time Not Scheduled
Judge: Honorable James Ware

Pursuant to Local Rule 6-3, Defendants Apple Inc. ("Apple") and AT&T Mobility LLC ("ATTM") (collectively "Defendants") hereby move the Court for an Order enlarging the time within which Defendants may Answer, or otherwise respond, to Plaintiffs Complaint.

Defendants also move the Court for an order to change the briefing schedule previously agreed to by the parties, pursuant to a stipulation filed with this Court on October 31, 2007. Defendants seek the Order enlarging time and corresponding change to the briefing schedule so that the briefing and hearing schedule for this action conforms with the briefing and hearing schedule in a related action. Such a change will promote judicial economy, including by permitting the Court to address motions to dismiss concerning the same allegations at the same hearing.

I. INTRODUCTION

Plaintiffs filed their Complaint in this action (*Holman, et al. v. Apple Inc., AT&T Mobility LLC, et al. – “Holman”*) on October 5, 2007. Also on October 5, 2007, an action was filed in state court against Apple; an amended complaint was filed on November 2, 2007 and the action was removed on November 7, 2007. *Timothy P. Smith, et al. v. Apple Inc., AT&T Mobility LLC, et al.*, Case No. 07-CV-05662-RMW (“*Smith*”).

Smith and *Holman* are both actions brought against Apple and ATTM which allege that Apple and ATTM entered into what plaintiffs call an unlawful agreement under which ATTM will be the exclusive provider of phone and data services for the iPhone in the United States and Apple will allegedly receive a portion of ATTM’s profits. *Holman* Complaint ¶¶ 38, 41; *Smith* First Amended Complaint (“FAC”) ¶¶ 28(1)-(3). The complaints further allege that through the use of a software lock and a software update, Apple has prohibited iPhone owners from unlocking their phones for use with cellular telephone service providers other than ATTM. *Holman* Complaint ¶¶ 34, 51-55; *Smith* FAC ¶¶ 28(4), 40-42.

Based on these allegations, both the *Smith* and *Holman* complaints assert claims against Apple and ATTM for unlawful tying and attempted monopolization under Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2. *Holman* Complaint ¶¶ 90-97; *Smith* FAC ¶¶ 128-35. The *Smith* and *Holman* complaints both also plead claims based on alleged violations of California’s Unfair Competition Law in addition to alleged violations of the California Cartwright Act’s prohibitions on unlawful tying and unlawful trusts. *Holman* Complaint ¶¶ 76-89; *Smith* FAC ¶¶ 117-27, 196-207. While *Smith* and *Holman* each assert additional causes of action against Apple and ATTM, all such claims relate to the same set of alleged practices of the

defendants described above. Thus, *Smith*'s separate causes of action for common law monopolization, *Smith* FAC ¶¶ 183-89, breach of warranties, *id.* ¶¶ 136-57, and alleged violations of the Consumer Legal Remedies Act, *id.* ¶¶ 158-65, the Computer Fraud Abuse Act, *id.* ¶¶ 166-71, the Racketeer Influenced and Corrupt Organizations Act, *id.* ¶¶ 190-95, and California Penal Code § 502, *id.* ¶¶ 172-82, are all based on the same alleged agreements and practices of ATTM and Apple. The same is true for *Holman*'s additional cause of action for "computer trespass/trespass to chattels." *Holman* Complaint ¶¶ 98-102.

Furthermore, both *Holman* and *Smith* are purported class actions that seek to represent the interests of the same class of people. *Holman*'s proposed class is composed of "all individuals or entities who at any time from June 29, 2007 to the date of judgment in this action, bought and implemented the iPhone and sustained damages as a result." *Holman* Complaint ¶ 63. *Smith*'s purported class is made up of "[a]ll persons or entities who... purchased or own an iPhone, intended for use by themselves, their families, or their members, participants, or employees ... during the period from June 29, 2007 through such time in the future as the effects of Apple's illegal conduct, as alleged herein, have ceased... [and who] purchased audio or video files from the iTunes Music Store during the Class Period." *Smith* FAC ¶¶ 93(a)-(b); *see also id.* ¶¶ 94(a)-(b). The two potential classes are thus nearly identical.

On November 9, 2007, Apple filed an Administrative Motion requesting that the Court determine that the *Holman* and *Smith* actions are related. See Defendant Apple Inc.'s Administrative Motion To Consider Whether Cases Should Be Related ("Motion for Related Cases").

On November 9, 2007, Defendants and the plaintiffs in the *Smith* action stipulated that Defendants would answer, or otherwise respond, to the *Smith* Complaint by or on December 21, 2007.¹ See Sasse Decl. ¶ 5, Exh. D. Given the obvious economies of having the parties and the

¹ It was further stipulated that "if Apple and/or ATTM respond to the Complaint through a motion, the parties agree that plaintiffs' opposition to the motion shall be filed on January 31, 2008, that defendants' reply brief(s) shall be filed on February 11, 2008, and that any such motions shall be set for hearing on February 25, 2008 or another date thereafter that the Court is available." Sasse Decl. ¶ 5 Exh. D.

1 Court consider any motions to dismiss or other motions in what the defendants believe to be
 2 related cases on the same schedule, counsel for ATTM sought the stipulation by counsel for
 3 plaintiffs in *Holman* to adjust the response date and briefing schedule to match the schedule set
 4 in *Smith*. Plaintiffs' counsel declined. See Sasse Decl. ¶ 6. Accordingly, in order to preserve
 5 resources and promote judicial economy, Defendants now request that the Court enlarge the time
 6 for Defendants to answer, or otherwise respond, to Plaintiffs Complaint and adjust the briefing
 7 schedule for any motions to match the briefing schedule in *Smith*.

8 **II. GROUNDS FOR GRANTING THE MOTION**

9 As discussed above, and more thoroughly in Defendant Apple's Motion for Related
 10 Cases, *Smith* and *Holman* are related cases. The cases involve the same defendants, and both
 11 challenge an agreement between Apple and ATTM concerning the iPhone, alleging that the
 12 agreement violates the antitrust and unfair competition laws. In addition, both *Holman* and
 13 *Smith* challenge various business conduct related to the iPhone and software updates to the
 14 iPhone. Accordingly Defendants respectfully submit that having both cases on the same
 15 schedule would save both Court and party resources, and would otherwise promote judicial
 16 economy.

17 Plaintiffs in this action will not agree to stipulate to further enlarge the time to answer, or
 18 otherwise respond, to the Complaint so that the briefing schedule matches the schedule in *Smith*.
 19 See Sasse Decl. ¶ 6. Defendant ATTM's counsel has corresponded with Plaintiffs' counsel and
 20 has sent a draft of this motion to Plaintiffs counsel requesting that Plaintiff agree to stipulate to
 21 the proposed enlargement of time to answer, or otherwise respond, to the Complaint. See Sasse
 22 Decl. ¶ 6. Plaintiffs' counsel has declined to so stipulate.

23 As discussed above, the briefing schedule has been modified previously by stipulation
 24 between the parties on October 31, 2007. Modifying the briefing schedule to conform to the
 25 *Smith* briefing schedule should have very little effect on the overall schedule of the case. The
 26 dates for the briefing schedule would be changed as follows:

<u>Brief</u>	<u>From</u>	<u>To</u>
Answer/Response	December 7, 2007	December 21, 2007
Opposition	January 10, 2008	January 31, 2008
Reply	January 21, 2008	February 11, 2007
Hearing Date	February 4, 2008	February 25, 2007

III. CONCLUSION

For all the foregoing reasons, good cause exists for the Court to grant Defendants Motion To Enlarge Time To Answer Or Otherwise Respond To Plaintiffs' Complaint and order an alternative briefing schedule.

Dated: November 16, 2007

CROWELL & MORING LLP

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By: _____

Christopher S. Yates, Esq.
Attorney for Defendant
Apple Inc.

CERTIFICATE OF SERVICE

I, Alice Kelly, declare:

I am a citizen of the United States over the age of 18. I am employed at the law firm of Crowell & Moring LLP, 3 Park Plaza, 20th Floor, Irvine, California 92614-8505. I am not a party to or interested in the causes entitled on the documents to which this certificate of service relates.

I hereby certify that on **November 16, 2007**, I served the document described below as:

MOTION TO ENLARGE TIME

on the interested parties in this action by placing a copy thereof, enclosed in a sealed envelope, at Irvine, California, addressed as follows:

SEE ATTACHED SERVICE LIST

- ☐ **BY REGULAR MAIL.** I caused such envelopes to be deposited in the United States mail, at Irvine, California with postage thereon fully prepaid, individually addressed to the parties as indicated above. I am readily familiar with the firm's practice of collection and processing correspondence in mailing. It is deposited with the United States postal service each day and that practice was followed in the ordinary course of business for the service herein attested to.
- ☐ **BY FACSIMILE TRANSMISSION.** I caused a true copy of the foregoing document(s) to be transmitted to the party listed above at the facsimile machine telephone number as last given by that person on any document which he or she has filed in this action and served upon this office.
- ☐ **BY FEDERAL EXPRESS.** I placed a true copy of the foregoing document in a sealed envelope or package designated by Federal Express with delivery fees paid or provided for, individually addressed to the party(s) as indicated on the attached service list, and caused such envelope(s) or package(s) to be delivered at Three Park Plaza, 20th Floor, Irvine, California 92614-8505, to an authorized courier or driver authorized by Federal Express to receive documents for overnight delivery.
- ☐ **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the office of First Legal Support Services by hand to the offices of the addressee.
- ☒ **BY ELECTRONIC MAIL.** I caused a true copy of the foregoing document to be sent via electronic mail in .PDF format, pursuant to agreement between the parties listed on the attached service list.
- ☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this Court, at whose direction the service was made.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this **16th day of November 2007**, at Irvine, California.

/s/ Alice Kelly
ALICE KELLY

SERVICE LIST

Paul Holman and Lucy Rivello v. Apple, Inc., AT&T Mobility LLC
Case No. 07-cv-05152-JW

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